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IN THE

Supreme Court of the United States

October Term, 1960

No. 67

ABRAHAM BRAUNFELD, ISAAC FRIEDMAN, ALTER DIAMENT, S. DAVID FRIEDMAN and JOSEPH R. FRIEDMAN,

Appellants,

—v.—

THOMAS J. GIBBONS, Commissioner of Police of the City of Philadelphia, and VICTOR H. BLANC, District Attorney of the City of Philadelphia,

Appellees.

BRIEF OF *AMICUS CURIAE*, NATIONAL RETAIL MERCHANTS ASSOCIATION

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BRIEF OF *AMICUS CURIAE*, NATIONAL RETAIL MERCHANTS ASSOCIATION

I. Interest of the National Retail Merchants Association, *Amicus Curiae*

The National Retail Merchants Association ("Association") is a voluntary trade association of retail department, chain and specialty stores organized in 1911 under the provisions of the membership corporations law of the State of New York. In the United States the members of the Association operate more than 11,500 stores, both large and small. Association members also operate stores in 40 foreign countries. Members of the Association do an annual volume of business in the United States in excess

of 19 billion dollars and employ more than a half million persons.

The retail industry provides the final and essential link in placing in the hands of the consumer the necessities of life, as well as the myriad of other goods and services necessary for the maintenance and enhancement of the nation's well-being. In terms of people gainfully employed the retail industry ranks second in size in the United States,[1] and constitutes an important and vital segment of our national economy.

More than one-half of the total volume of department, chain and specialty stores (excluding food and food products) in the United States are made by members of the Association. It is therefore readily apparent that legislation affecting shopping hours and shopping days for retail stores is of vital interest to the Association's members and employees.

This brief is submitted by the Association with the written consent of all parties. The brief has been filed in this case rather than in any, or all, of the other Sunday law cases now before this court because the consents of the parties in this case were readily granted. It is believed, however, that the principles stated herein are generally applicable to all the pending cases.

II. Argument

The parties to this action and the other Sunday law cases now before this court have discussed at length the question whether prohibiting the retail sale of commodities on Sunday constitutes the establishment of religion or prohibits the free exercise thereof within the meaning of

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[1] Department of Labor, Bureau of Labor Statistics; Production of Non-Supervisory Workers in Non-Agricultural Establishments by Industry, August, 1960, Volume 83, No. 8, p. 884.

the First and Fourteenth Amendments of the Constitution of the United States. We shall not here discuss those issues, except to state that we believe that in our present-day society Sunday closing laws represent a proper exercise of state police power to establish a uniform day of rest, and do not in any way constitute the establishment of religion or interfere with the free exercise thereof in contravention of the Federal Constitution.

The interest of this Association in the issues presented by the pending Sunday law cases does not stem from any religious consideration. Its members include not only persons of the Christian faith but persons of other faiths, including Judaism, and perhaps persons of no faith. The interest of the Association and its members in these cases is purely economic and social. We are keenly aware of the impact which Sunday business operations have upon the health and welfare of our employees, most of whom are women and many of whom are married, and the communities in which they live and work, and we are much concerned about the effect which seven-day-a-week operations will have upon the economic position of the retail industry.

Since the recent increase in Sunday retail operations, the Association has taken formal action opposing these activities by retailers. On January 14, 1959, the annual meeting of the National Retail Merchants Association voted unanimously to adopt the following resolution:

> "We believe that all stores should be closed on Sunday except those engaged in selling articles absolutely necessary to the health and welfare of the community. We therefore urge that stores permitted by law to transact business on Sunday for the purpose of selling articles of necessity be strictly limited to the sale of such articles, and we urge that retailers support legislation for this purpose."

On January 13, 1960 the membership of the National Retail Merchants Association reaffirmed its position on Sunday

closings by the adoption of a resolution substantially identical with the resolution approved in 1959.

The social benefit to be derived from uniform day of rest statutes has been fully considered in an *amicus* brief filed in this action on behalf of the Retail Clerks International Association, AFL-CIO. The arguments presented in this brief, therefore, will be confined to the economic impact of seven-day-a-week operations.

Despite the manifest importance of the retail industry in the American economic scheme, it is beset by many economic problems. One of the major problems of most of the industry has been the constant struggle to maintain a sufficient profit margin to continue in business and meet the needs of our expanding population and economy. For the year 1959 department store profits throughout the United States based on volume averaged 2.85% after taxes. The record of earnings in the department stores for the four prior years were: 1958—2.75%; 1957—2.80%; 1956—3.10%; 1955—2.85%.[2] For the same years, profits of specialty stores were even lower: 1958—1.4%; 1957—1.4%; 1956—1.6%; 1955—1.55%.[3]

One of the fundamental causes for this low margin of profit is the keen competition which exists throughout the industry as evidenced in many areas of operations. In the matter of business hours and shopping days, for example, retail stores are competitively sensitive to the operations of other stores in their community. Failure of one store to open when his competitor is open means loss of business during that period. The result has been that in most areas competing retail stores traditionally observe substantially uniform opening and closing hours. Since

[2] *Operating Results of Department & Specialty Stores in 1959*; Harvard Business School, Division of Research, Boston, Mass., p. 7.

[3] *Ibid.*, p. 21.

1950, however, there has been an increasing tendency in many areas for some retail stores to operate on Sunday, many in disregard of statutes which prohibit retail sales on that day except for necessary and essential items. Although most retail stores have continued to remain closed on Sunday in compliance with existing statutes, the burgeoning of Sunday retail sales has in the past decade imposed steadily increasing competitive pressure upon retailers who traditionally have not opened on that day. While it is true that until now the number of retail stores which maintained illegal Sunday operations is not in the majority, they are steadily increasing in size and number, and the competitive situation is such that if Sunday closing laws are held invalid it is inevitable that competing retail stores will be forced to open on Sunday in their struggle for the consumers' dollar.

It is believed that if legal sanction is given to Sunday operations of retail stores the result will be to increase overhead expenses of the retail industry generally, with no increase in total weekly sales, and a consequent further reduction of profit margins. Obviously retail stores now open on Sunday enjoy a temporary advantage over stores which remain closed on that day. If Sunday closing statutes are set aside, however, competition in the retail industry will force most other retail stores to open on Sunday, the sales volume of each store will return to normal, and the initial advantage of the present Sunday operators will disappear. The significant fact is that there will be no increase in the volume of sales by reason of the additional shopping day, but there will be additional overhead expense, particularly by reason of increased payroll expense. It is the prevailing practice among NRMA member stores to pay overtime for work performed on Sundays or holidays.

It is believed, in other words, that Sunday store opening will simply spread the sum total of dollars available for

consumer goods over seven days of operation instead of six days. The effect will be to drive marginal retailers out of business, and, in an uneconomic way, either to reduce the profit margin of those stores which survive, or to cause increased costs being passed on to the consumers.

Sunday openings are likely to have another adverse effect upon the retail industry in its program of personnel recruitment. Americans generally, at the professional, executive and employee level, are showing an increasing disinterest in long hours of work. As one scholar has stated,[4] it appears "a general decline is occurring in the zest for work * * *." This author has pointed out that there is evidence of an increasing reluctance on the part of young people to enter upon professional or business careers which demand night work and weekend hours. Sunday operations will further impair the long-range personnel recruitment aims of the retail industry. If the retail industry is to continue to serve the people of an expanding society, it must be able to attract able young men and women without the added burden of the socially distasteful seven-day-a-week operation.

We respectfully submit that while the problems of longer work week for retail employees, reduced profits for the retail industry, and difficulty of personnel recruitment, which are likely to arise if Sunday retail selling is to be forced upon our society, are peculiar to the retail industry itself, these problems are only concurrent symptoms of greater and more widespread evils which will result if Sunday becomes "just another day" of the business week. The broad sociological implications of irregular work schedules have been discussed in the brief of the Retail Clerks.

To permit, and in effect competitively to require, retailers to engage in widespread Sunday operations would

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[4] David Reisman, *Leisure and Work in Post-Industrial Society in Mass Leisure*, edited by Larabee & Meyersohn, pages 375-376.

effectively uproot this day as the one day of the week which traditionally has been recognized and preserved as a day of rest and relaxation in most communities throughout our nation. Our customs have established, and our legislatures and courts have decreed, that a uniform day of rest, on which all but essential commercial activities cease, is in the interest of the health and welfare of our society.

III: CONCLUSION

The Court should affirm the judgment of the court below.

Respectfully submitted,

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